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Respondent.

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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 09-9000, Skinner v. Switzer.
5 Mr. Owen.

6 ORAL ARGUMENT OF ROBERT C. OWEN

7 ON BEHALF OF THE PETITIONER

8 MR. OWEN: Mr. Chief Justice, and may it
9 please the Court:

10 The issue before the Court today and the
11 only question litigated to decision in the courts below
12 is whether a prisoner's claim that seeks only access to
13 evidence for DNA testing may be brought in Federal court
14 under the Civil Rights Act.

15 The Fifth Circuit summarily answered that
16 question "no," adhering to its long-standing view that
17 any Federal claim that might conceivably set the stage
18 for a subsequent collateral attack, however removed in
19 time, must itself be brought via habeas. That rule so
20 clearly cannot be squared with the decisions of this
21 Court, especially since Wilkinson v. Dotson, that the
22 Court should reverse and remand.

23 I'd like to begin by describing the contours
24 of the Heck rule, and --

25 JUSTICE GINSBURG: May I ask you about --

1 Wilkinson was a parole, parole eligibility, so it didn't
2 touch the conviction or the sentence, where this one
3 does. So the cases are distinguishable on that basis.

4 MR. OWEN: I -- Justice Ginsburg, the reason
5 that we argue our case does not touch the conviction is
6 that the relief that we are seeking, to have access to
7 the evidence for testing, if we won, if we win in
8 district court and we get that access, it does not
9 necessarily imply -- which is the language this Court
10 used in Heck and repeated in Dotson -- that the
11 conviction is lawfully invalid.

12 JUSTICE GINSBURG: I understand that
13 argument, but there is the distinction of the type of
14 case of where the -- the one, conviction and sentence
15 were never going to be questioned, only parole
16 eligibility; where here, the discovery that you seek in
17 1983 is not a destination. The destination is to
18 further litigation that may or may not arise.

19 MR. OWEN: That's true, Your Honor. We --
20 we don't see that as a distinction that compels the
21 conclusion that Dotson isn't the model to follow,
22 because in our view, what Dotson said -- again, the
23 prisoners, as Justice Ginsburg says, were before the
24 court seeking a declaration about parole procedures that
25 Ohio planned to use in their cases. Those parole

1 procedures had been adopted after those prisoners were
2 sent to prison, and they complained that was an ex post
3 facto violation.

4 And Ohio argued, both in the Sixth Circuit
5 and in this Court, that the fact that these prisoners
6 expected at some point to come back to court armed with
7 a judgment in their favor and seek a reduction in their
8 sentences was enough to conclude that the case should be
9 within the core of habeas.

10 JUSTICE KENNEDY: It does seem odd,
11 though -- and I don't want to jump into your argument
12 too much, because you have got planned out what you want
13 to tell us. It does seem odd that if your suit for DNA
14 testing is not attack -- an attack on the sentence, that
15 you asked for a stay.

16 I mean, if it's not an attack on the
17 sentence, why shouldn't that factor into our decision
18 not to grant a stay or to grant a stay? It's -- it's an
19 irony in your position.

20 MR. OWEN: I think it's an irony -- I -- I
21 accept the Court's point that that -- that that seems
22 unusual, but I think that the reason that the Court's
23 cases, at least as to the relief that we're seeking and
24 not the stay that the Court entered in order to hear
25 this case and decide the question, that the relief we

1 are seeking does not necessarily imply the legal
2 invalidity of the conviction.

3 JUSTICE KENNEDY: Well, we don't grant a
4 stay in order to decide a question. We grant a stay
5 because there's a likelihood of success on the merits.
6 And that goes to the sentence. And now you're telling
7 us that your attack doesn't go on the sentence. I don't
8 see why we don't just lift the stay, under your own view
9 of the case.

10 MR. OWEN: No, Your Honor. I think -- if
11 I -- if I was understood to say that, then I -- let me
12 clarify.

13 I think that our success -- when the Court
14 applies the stay standard, it asks the question: What
15 is the likelihood of success on the merits? Success on
16 the merits, for purposes of our lawsuit, means getting
17 access to the evidence. That's -- that's what it means.

18 JUSTICE KENNEDY: If that's all it means, we
19 shouldn't have granted a stay.

20 MR. OWEN: I don't -- I don't think so, Your
21 Honor, because I think once we had demonstrated that we
22 were likely to prevail on the merits of the case, I
23 think the Court was within, you know, appropriate
24 judgment to -- to make sure that the case didn't become
25 moot by Mr. Skinner's execution, because I do think that

1 the demonstration that we had to make was not about
2 whether his ultimate -- or whether, ultimately, he might
3 get relief from his conviction, but whether we had a
4 chance of prevailing on this civil rights claim that
5 asks for access to the evidence.

6 CHIEF JUSTICE ROBERTS: But that disconnects
7 the irreparable harm alleged with respect to the stay
8 and your claim that you now say -- you say now your
9 claim is not going to necessarily affect the -- the
10 sentence. The irreparable harm, if I remember, is quite
11 obviously the execution. But it's -- there is no
12 irreparable harm from your failure to get access to the
13 DNA evidence, unless it's linked to the sentence.

14 MR. OWEN: Your Honor, I -- I guess I don't
15 have a better answer than the one I gave
16 Justice Kennedy, and that is that I think that the stay
17 standard doesn't have to link those two things. I think
18 that if the Court finds that Mr. Skinner is going to die
19 before he can litigate his claim and it finds he has a
20 reasonable chance of prevailing on that claim, that's
21 sufficient to -- to enter the stay.

22 JUSTICE ALITO: In the real world, a
23 prisoner who wants access to DNA evidence is interested
24 in overturning his conviction.

25 MR. OWEN: Absolutely.

1 JUSTICE ALITO: Do you deny that?

2 MR. OWEN: No, Your Honor.

3 JUSTICE ALITO: And isn't the emergence of
4 the Rooker-Feldman argument in this case an illustration
5 of the absurdities that pursuing the 1983 path produces?
6 Because habeas is not subject to claim preclusion, is
7 it?

8 MR. OWEN: No.

9 JUSTICE ALITO: It's not subject to
10 Rooker-Feldman?

11 MR. OWEN: No, it's not subject to those,
12 Your Honor.

13 JUSTICE ALITO: But since you've squeezed
14 this into 1983, now have you to deal with both of those
15 issues.

16 MR. OWEN: I think that the -- the
17 reason that -- I think the reason the Rooker-Feldman
18 issue has arisen at this juncture in the case is that
19 the pleadings in the district court were not permitted
20 to -- because of the sort of -- the fact that we were
21 dismissed at a very early stage in the process,
22 essentially on the threshold of the case, there was no
23 opportunity to develop in full what the legal arguments
24 are for both sides. I --

25 JUSTICE KENNEDY: Except that at page 18 of

1 the yellow brief, where you did have time to explain
2 your doctrine, you say a Federal constitutional issue
3 arose only because the Court of Criminal Appeals'
4 decision regarding the State law issue turned out to be
5 so arbitrary and unreasonable as to denying
6 Mr. Skinner's Federal due process rights.

7 Correct me if I am wrong, but I think --

8 MR. OWEN: No, that's --

9 JUSTICE KENNEDY: I thought that's
10 Rooker-Feldman to a tee. Correct me if I'm wrong.

11 MR. OWEN: No, I think, Your Honor, that --
12 I -- I don't agree about the Court's reading of
13 Rooker-Feldman if you think that -- if the Court
14 believes that that would preclude it. And the reason is
15 this: In the Feldman case itself, the -- the plaintiffs
16 in that case, who were unsuccessful lawyers who are,
17 what, a law school graduate and an attorney who was
18 barred outside the District of Columbia, and were trying
19 to get a waiver for a requirement for taking the bar
20 here in the District of Columbia -- they filed a number
21 of claims against the application of that rule by the
22 District of Columbia Court of Appeals in their
23 circumstances.

24 But -- and this Court said those claims
25 can't proceed. Those claims challenge the application

1 of the law to the facts.

2 But this Court went on to say in Feldman --
3 the last paragraph of the opinion says they have also
4 raised other claims, and those claims are that this
5 rule, as authoritatively construed by the District of
6 Columbia Court of Appeals, is -- is unconstitutional.
7 It violates the Constitution. And the Court said, in
8 Feldman, those claims may proceed. And --

9 JUSTICE KAGAN: Mr. Owen, as I -- as I
10 read -- I'm sorry.

11 JUSTICE SOTOMAYOR: I'm sorry. What's the
12 rule that's arbitrary and capricious that you're
13 challenging?

14 MR. OWEN: Your Honor, the rule that we are
15 challenging is that when the Court of Criminal Appeals
16 construed the fault provision of the Texas DNA testing
17 statute in our case, it created a wholesale
18 classification that said everybody who falls into
19 Mr. Skinner's situation who did not ask for testing at
20 trial is forever foreclosed from getting testing. And
21 --

22 JUSTICE SOTOMAYOR: Could you tell me how
23 that's different than what Alaska did in the Osborne
24 case that we upheld; their procedure? I thought that
25 was one of the elements of the Alaska rule as well.

1 MR. OWEN: I think -- I'm sorry.

2 JUSTICE SOTOMAYOR: That if you had an
3 opportunity to ask for it and gave it up, that you lost.
4 So how are we getting to that here? And how are you
5 going to get past Osborne here?

6 MR. OWEN: I think in Texas we have -- the
7 difference, I think, Your Honor, is the difference
8 between a substantive due process claim, as I understand
9 it, and a procedural due process claim. That in Osborne
10 the claim that was being made was that the State was
11 denying a Federal right in denying access on that basis.

12 Our argument is that the Texas -- the Texas
13 statute was enacted to grant, essentially, protection to
14 a class of inmates who were -- inmates who were
15 wrongfully convicted and can prove that with DNA
16 evidence -- and then -- and then interprets that statute
17 in a way that needlessly chops a bunch of those inmates
18 out, and that that's arbitrary, at least to the extent
19 that it doesn't have reference to the specific facts of
20 the case, the likelihood of innocence, the reasons for
21 not doing the testing, and so on.

22 CHIEF JUSTICE ROBERTS: Osborne expressly
23 considered both procedural due process and substantive
24 due process.

25 MR. OWEN: But the reason, Your Honor, as

1 I -- as I read Osborne, that it did not reach a
2 decision on the procedure, or it didn't -- that it
3 rejected Osborne's procedural due process claim was
4 because he hadn't tried at State court.

5 I mean, that was the premise of Osborne,
6 was he was -- I think the Court's language in Osborne
7 was if he hasn't tried those procedures, he's in no
8 position to complain about them in Federal court,
9 whereas we did try the procedures, and it's precisely
10 that that is the basis for our claim in Federal court.

11 If I --

12 JUSTICE SOTOMAYOR: Are you --

13 MR. OWEN: I'm sorry.

14 JUSTICE SOTOMAYOR: Are you -- one of the
15 criticisms by your adversary of your proposal to bring
16 these actions via 1983 is a prospect that the courts
17 will be used to collaterally attack convictions by all
18 sorts of due process allegations concerning discovery
19 disputes. Could you address that point, and why either
20 you agree with them that that's what is going to happen,
21 or if you don't, why not?

22 MR. OWEN: I don't agree with them, Your
23 Honor, and for a couple of reasons. First of all is
24 that experience doesn't suggest that. The rule that we
25 are asking the Court to adopt for the whole nation has

1 been the rule for some time in six different circuits,
2 and there's no evidence that in those circuits there
3 have been a very large number of prisoners going into
4 court under section 1983 and trying to leverage
5 discovery under the circumstances that are suggested by
6 Respondent's brief. So that's the practical reason.

7 As a legal -- as a legal reason, I think
8 that our claim turns on the existence of the liberty
9 interest in the State statute for DNA testing that Texas
10 has created, and that there is no statute in Texas for
11 other kinds of general discovery; for example, access to
12 the prosecutor's file, police reports, or other kinds of
13 documents. That's not -- there's no legal hook for
14 that.

15 Our legal hook is the existence of that DNA
16 testing statute and the existence under State law of
17 opportunities to bring claims of actual innocence after
18 the evidence is tested.

19 CHIEF JUSTICE ROBERTS: The critical
20 formulation in Heck, "necessarily implies," is a little
21 difficult. I mean, the adverb points one way and the
22 verb points the other. And how -- "necessarily implies"
23 strikes me as a little less conclusive than you seem to
24 think.

25 MR. OWEN: I think -- I think if that word

1 were in isolation, Your Honor, there might be more
2 uncertainty about what "implies" means. But if the
3 Court looks at the cases -- looks at Preiser, looks at
4 Heck, looks at Edwards, looks at Nelson, looks at Hill
5 -- what you'll see is the word "necessarily" is in all
6 those cases. And, in fact, in Hill, I think -- or maybe
7 it was Nelson; one of the two Florida cases -- the Court
8 italicizes it twice in the same paragraph. And --

9 CHIEF JUSTICE ROBERTS: Well, you -- you
10 read "necessarily implies" to mean "conclusively
11 establishes," right?

12 MR. OWEN: Not that strong, Your Honor. But
13 to finish, the other answer I was going to say is that
14 in other cases -- I was going to say, "necessarily" is
15 everywhere. "Necessarily" is in all the cases. But the
16 Court also -- "implies" is not in all the cases. In
17 Dotson, for example, the Court uses the word
18 "demonstrate" -- "necessarily demonstrates" -- that the
19 judgment underlying the custody is invalid.

20 So I think that there is some --

21 CHIEF JUSTICE ROBERTS: So you are asking
22 for an expansion of Heck from "necessarily implies" --

23 MR. OWEN: No, I think we are -- I think --

24 CHIEF JUSTICE ROBERTS: -- to
25 "demonstrates"?

1 MR. OWEN: No, Your Honor. I think that --

2 CHIEF JUSTICE ROBERTS: So if "implies"
3 doesn't mean the same as "establish" or "demonstrates,"
4 give me an example of a case where the 1983 claim would
5 not establish innocence but would still be covered by
6 Heck.

7 MR. OWEN: I think that -- I think Edwards
8 is an example of that, Your Honor, where -- in Edwards,
9 the defendant, the prisoner, was suing in Federal court,
10 alleging that, in his words, the procedures that were
11 used to deny him -- I think it was deny him parole or
12 convict him of disciplinary offenses, but the procedures
13 that had resulted in the disadvantage he was complaining
14 about were unconstitutional.

15 But when you looked at his complaint, what
16 he said was this -- the reason those procedures are
17 unconstitutional is because the decision maker was
18 personally biased against me, which is less a complaint
19 about the procedures and more a complaint about the
20 merits of that adjudication. And if you believe it, if
21 you credit that, and say, okay, we're going to win,
22 fine, that's what happened, the adjudication was biased
23 against you, that necessarily implies the invalidity of
24 the judgment reached by that procedure.

25 CHIEF JUSTICE ROBERTS: Necessarily implies

1 or conclusively establishes?

2 MR. OWEN: I think necessarily -- with bias,
3 perhaps that would be conclusively established, because
4 I think there's no harmlessness test there. But I think
5 that -- at least in an adjudication, there wouldn't be.
6 But I think that "necessarily implies" is all that the
7 Court needs to continue embracing in order to find
8 that --

9 JUSTICE SOTOMAYOR: What would you do with
10 the Brady violation? Is that a "necessarily implies" or
11 is that more akin to your claim?

12 MR. OWEN: For a couple of reasons, Your
13 Honor, it's not akin to our claim. First is this:
14 Brady is a trial right. And I don't mean necessarily
15 that it arises at trial, because sometimes it arises
16 at -- the discovery that makes a Brady claim colorable,
17 you know, arises after trial. But Brady is a right to
18 have certain evidence when you go to trial so that you
19 can use it in an attempt to get the jury to find you not
20 guilty.

21 And, therefore, if that right is violated,
22 if you don't get that evidence and it's discovered later
23 that you were denied this stuff that you needed to have
24 a fair trial, that implies the invalidity of the trial
25 judgment, the judgment that results in the custody.

1 In our case, the judgment that we are
2 challenging is the judgment of the Court of Criminal
3 Appeals denying us DNA testing, which does not in the
4 same way demonstrate or necessarily imply that the
5 custody judgment in our case is legally invalid.

6 JUSTICE KAGAN: Mr. Owen, could I take you
7 back to Rooker-Feldman with that as the premise? You
8 said that what you are attacking is the judgment. I
9 read your complaint as having an important strand where
10 you were not attacking the judicial judgment, but
11 instead were attacking actions of the prosecutor's
12 office, independent of any judgment of the State courts.

13 Are you abandoning that part of your
14 complaint, or are you continuing to maintain it?
15 Because certainly, if you talk about the judgment alone,
16 it at least gets you into Rooker-Feldman territory,
17 whereas if you talk about the prosecutor, it does not.

18 MR. OWEN: I think, Your Honor, that we --
19 that we are in the territory of talking about the
20 judgment. And I think for the reasons I've described
21 earlier that that does not lead inexorably to a
22 Rooker-Feldman bar.

23 But I think that the nature of our claim,
24 which follows from Osborne, what we understood the Court
25 to be recognizing in Osborne, or acknowledging in

1 Osborne, is that the State's administration of its DNA
2 testing scheme is where a due process violation might
3 theoretically arise, depending on how it's administered.
4 So I think --

5 JUSTICE SCALIA: I don't -- I don't
6 understand the argument you're making. Are you
7 challenging the constitutionality of the Texas statute?

8 MR. OWEN: As interpreted in our case, or as
9 construed, I think is the right -- is the better word.
10 As --

11 JUSTICE SCALIA: Well, "as construed" -- I
12 mean, it's their statute. I mean, you say somewhere in
13 your brief that -- that they gave it an arbitrary and
14 capricious interpretation. It's up to them how they
15 want to interpret it. We don't -- we don't reinterpret
16 State statutes because the State Supreme Court
17 interpreted it strangely.

18 It seems to me you're either challenging the
19 statute or -- or you don't belong here.

20 MR. OWEN: I think, Your Honor, we are
21 challenging the statute. And I think once the Texas
22 Court of Criminal Appeals says here is what the default
23 provision means, that is the same thing, for the
24 purposes of this Court's review, as if the legislature
25 had written that in. So --

1 JUSTICE SCALIA: Okay. Just so long as
2 we're clear about that.

3 MR. OWEN: Yes, sir. So that's what we are
4 challenging. I certainly agree if we were saying they
5 got it wrong on their own terms, that would be a
6 Rooker-Feldman bar, because we couldn't bring that
7 claim.

8 JUSTICE BREYER: I assume that this whole
9 case focuses on paragraph 33 of your complaint; is that
10 right?

11 MR. OWEN: There's been a lot -- yes, but --
12 I mean, I think there's been a lot of talk --

13 JUSTICE BREYER: And what is the "but"?

14 MR. OWEN: I think there has been a lot of
15 discussion about the allegations in the complaint,
16 particularly those paragraphs. I think that is maybe
17 missing the larger point, which is this: As we said
18 earlier, I think that the Federal rules permit
19 complaints to be notice pleading. They permit
20 amendment. They permit development of the issues.

21 JUSTICE BREYER: So, what's -- look, 33 says
22 the District Attorney has violated my rights under the
23 law by refusing to give me the DNA evidence, so make him
24 do it.

25 That's how I read 33.

1 MR. OWEN: That's -- that's the relief that
2 we're asking for, Your Honor.

3 JUSTICE BREYER: But not the relief. That's
4 your complaint.

5 You explain why you think it violates
6 Federal law for him not to do it. You ask him to do it.
7 Is there anything else to this case?

8 MR. OWEN: I think there is the
9 constitutionality of the construction of the statute,
10 because that is the basis on which the DNA --

11 JUSTICE BREYER: But that's why you are
12 entitled to the relief.

13 MR. OWEN: All right. Yes.

14 JUSTICE BREYER: Is there anything else in
15 the case that you want?

16 MR. OWEN: No. We're not asking -- no. I
17 mean, I think --

18 JUSTICE BREYER: You want the DNA evidence?

19 MR. OWEN: We want the evidence. That's
20 correct. We don't -- we're not asking this court, the
21 Federal District Court, to release Mr. Skinner from
22 custody. We're not asking them to accelerate the
23 release date on his sentence, for which there is none.
24 We're not asking them to modify the status of his
25 custody.

1 All of those things which are at the core of
2 habeas corpus, as this Court has interpreted that
3 phrase, none of those are requested by us.

4 JUSTICE SOTOMAYOR: Well, you are --

5 CHIEF JUSTICE ROBERTS: Well, but what you
6 say in the rest of paragraph 33 is that you want the
7 biological evidence because by refusing to turn it over,
8 he prevented you from gaining access to exculpatory
9 evidence that could demonstrate he is not guilty of
10 capital murder, which is usually what we -- what habeas
11 corpus is for: To show you are not guilty of what you
12 are in prison for.

13 MR. OWEN: I -- I think ordinarily, Your
14 Honor, if that were our -- if we knew today that this
15 evidence in fact was exculpatory, if they had already
16 done the testing and they mail us a report that says it
17 has excluded your guy, then we wouldn't file a 1983
18 action. We would seek clemency, or we would file a
19 State habeas petition. We would do something where the
20 court would have the power to --

21 JUSTICE BREYER: You didn't agree with what
22 the Chief Justice just said, did you? I noticed you
23 were nodding your head.

24 (Laughter.)

25 JUSTICE BREYER: He said, and I --

1 MR. OWEN: That "necessarily implies --

2 JUSTICE BREYER: I mean, if you agree with
3 that, I guess there's nothing left of this case.

4 MR. OWEN: I think --

5 JUSTICE BREYER: But I -- but do you agree
6 with that?

7 MR. OWEN: No, Your Honor. I think that --
8 I think that "necessarily implies," as the Court
9 interpreted that phrase in Dotson, means somewhere down
10 the road you may come back to court and you may attempt
11 to undo your custody, and that's not enough to put this
12 case into habeas, that that --

13 CHIEF JUSTICE ROBERTS: I understand. But
14 did I understand you to say that you -- different cases
15 where people are seeking the DNA evidence might come out
16 differently under Heck. In other words, if it's the
17 type of DNA evidence that could conclusively establish
18 he's innocent. I mean, there are types like that. It's
19 somebody else's, you know, DNA and that's what's
20 necessary for the conviction.

21 And there's others -- other types of DNA
22 evidence that doesn't. I mean, it just happens to be on
23 the scene of the crime and it turns out that it's not
24 him that was in the room, but, you know, he was
25 somewhere else, and it might or might not mean he's

1 innocent.

2 In the former case, do you say that has to
3 go under habeas, but in the latter it doesn't?

4 MR. OWEN: I think when we are seeking
5 access to evidence which has never been tested for
6 testing, that could be brought under 1983.

7 I think if the evidence has been tested and
8 test results exist and are known and are exculpatory,
9 that is a -- that's a different case and that's probably
10 habeas, because then it's the fact that the results are
11 known and we know they are exculpatory that does
12 necessarily imply that there's something about the
13 judgment that could be undone.

14 JUSTICE GINSBURG: Mr. Owen, you're fitting
15 your case into our decisions about the line between 1983
16 and habeas. But if nobody -- if you didn't know
17 anything about that and you looked at what's presented
18 here in a civil case, it seems as though you are
19 splitting your claim; that is, you want discovery, and
20 if the discovery is favorable, then you ask for relief
21 from the conviction.

22 So it's the -- it's quite unlike I'm
23 complaining about prison conditions. Here, the whole
24 purpose of your seeking this discovery is so that you
25 will be able, if it turns out to be in your favor, to

1 apply for habeas.

2 MR. OWEN: The whole -- I agree, Your Honor,
3 that the whole purpose for seeking this evidence and
4 pursuing this lawsuit is so that Mr. Skinner can have a
5 meaningful opportunity to pursue the liberty interest he
6 has under State law in trying to secure release based on
7 innocence. That is correct. But I don't think that
8 leads inexorably to the idea that this lawsuit, which
9 is --

10 JUSTICE GINSBURG: Could you have sought
11 habeas? Is it 1983 is the exclusive relief, or could
12 you have sought habeas relief?

13 MR. OWEN: I think, Your Honor, that since
14 our allegation is that the Court of Criminal Appeals
15 decision denying us DNA testing, which is not the
16 judgment that results in Mr. Skinner's custody, is the
17 problem -- that's the bad, invalid judgment from our
18 legal theory -- that could not have been brought in a
19 habeas corpus proceeding, because I think that the
20 relief that a Federal habeas court would have available
21 to itself is limited to release, to accelerating release
22 or changing custody status. I don't think that there is
23 power in the Federal habeas court under that statute to
24 say, even though this will not affect the judgment as to
25 which you are in custody, I'm going to act on this way

1 and order this person to do that or the other thing. I
2 think that it wouldn't be available in habeas, Your
3 Honor.

4 JUSTICE SCALIA: Well, couldn't the habeas
5 court say the conviction was invalid because of the
6 failure to turn over this -- this DNA evidence, which
7 was relevant to the defense and which was
8 unconstitutionally denied? Why wouldn't that be a basis
9 for setting aside the conviction?

10 MR. OWEN: Your Honor, this Court has never
11 said -- and I know the Court's aware of this; I want to
12 make sure I'm clear on that -- this Court has never said
13 that it would be a constitutional basis for habeas
14 relief if you could demonstrate that, factually, you
15 were not guilty.

16 So that's the claim that would have to be
17 brought in such a Federal habeas. It's not presently
18 available because this Court has never held that. And I
19 think, given the constraints of the Federal habeas
20 statute and the requirement of clearly established
21 Federal law from this Court, before a prisoner can get
22 relief, that's a necessary prerequisite for us seeking
23 that relief. And -- and I'm sorry. I hope that is
24 responsive, Your Honor.

25 The -- the problem, I think, with just going

1 to Federal court and saying give us discovery, I think
2 it's the same problem as described earlier with the
3 Brady framework. If we knew today that the --

4 JUSTICE SCALIA: I'll tell you what the
5 problem is. The problem is Rooker-Feldman. That's --
6 that's why all of these things don't make much sense. I
7 mean, it wouldn't happen because you had the opportunity
8 to raise that in the State court, and now you're
9 retrying what the -- what the State court did decide.

10 MR. OWEN: I think to the extent, Your
11 Honor, that the question goes to the opportunity that we
12 had to raise this issue in State court, that's a
13 preclusion issue, and there may be preclusion issues
14 back in the district court. We may have a dogfight over
15 whether or not this claim should have been raised in
16 State court.

17 But that's not the Rooker-Feldman question,
18 as I understand it. I think the Rooker-Feldman question
19 is: What are we asking the Federal court to review?
20 And what we are asking the Federal court to review is
21 the Criminal Court of Appeals' authoritative
22 construction of the statute.

23 JUSTICE SCALIA: But -- but that would be an
24 obstacle to habeas.

25 MR. OWEN: Yes.

1 JUSTICE SCALIA: Because in habeas you'd be
2 seeking to set aside --

3 MR. OWEN: That's right.

4 JUSTICE SCALIA: -- the State court
5 judgment. Okay?

6 MR. OWEN: That's right. Habeas would be --
7 habeas would be our only route --

8 JUSTICE SCALIA: That's why it's so
9 unrealistic to analyze it that way, it seems to me.

10 MR. OWEN: Well, Your Honor, I think -- I'm
11 -- I'm not sure I agree that it's unrealistic. I mean,
12 I think that over time the courts who are wrestling with
13 this issue in the wake of Osborne will identify what
14 aspects of a State's statute and construction of such
15 statutes violate due process or don't.

16 JUSTICE KENNEDY: Why isn't it a correct
17 formulation of your answer to Justice Scalia to say what
18 we are seeking is a determination that the State court's
19 judgment, State court's decisions, State court's order
20 was a violation of due process? If you say that --

21 MR. OWEN: That's -- that's a much simpler
22 answer, Your Honor, and I will adopt that answer.

23 (Laughter.)

24 JUSTICE KENNEDY: But that's Rooker.

25 MR. OWEN: That's not -- no, Your Honor, I

1 think, again -- and this is where we started, and I'm
2 not trying to -- to bring us back full circle, but I
3 think that our understanding of Rooker-Feldman is that
4 that is not one of the things that the Rooker-Feldman
5 doctrine prohibits. And, of course, this Court has
6 emphasized in recent years, in the Exxon case and
7 elsewhere, that lower courts have been reading
8 Rooker-Feldman too broadly.

9 Mr. Chief Justice, if I may reserve the
10 remainder of my time.

11 CHIEF JUSTICE ROBERTS: Thank you, Mr. Owen.
12 Mr. Coleman.

13 ORAL ARGUMENT OF GREGORY S. COLEMAN
14 ON BEHALF OF THE RESPONDENT

15 MR. COLEMAN: Good morning, Chief Justice
16 Roberts, and may it please the Court:

17 To decide this case, the Court only needs to
18 make two stops. First is paragraph 33 of Mr. Skinner's
19 complaint.

20 That complaint, that statement of his
21 complaint clearly alleges against Ms. Skinner -- Ms.
22 Switzer herself that she has withheld -- and the word he
23 uses is "exculpatory" evidence -- and violated his due
24 process rights through that.

25 CHIEF JUSTICE ROBERTS: Well, he says

1 exculpatory evidence that could demonstrate that he's
2 not guilty. There's a lot of exculpatory evidence that
3 might imply, necessarily imply guilt, but there's a lot
4 of exculpatory evidence that simply is helpful and
5 doesn't mean it will demonstrate. He says it could.

6 MR. COLEMAN: There -- there are two points
7 in response to that, Chief Justice Roberts, and the
8 first is that this is the classic statement of a Brady
9 claim. When you file a Brady claim, you don't know
10 exactly what it is and whether it will definitely be
11 exculpatory or not. You have learned information that
12 makes you think that it would be, and you're able to --

13 JUSTICE SOTOMAYOR: The substantive right in
14 Brady was to have that material at trial, so that it is
15 -- that's the substantive constitutional right. Here
16 the substantive right that's been identified in Osborne
17 is the liberty interest created by State law. And that
18 only happens after the conviction. So it's not quite
19 the same. It's not comparable.

20 MR. COLEMAN: I'm not -- I'm not saying that
21 legally that there isn't some difference to be made from
22 Osborne. Osborne rejected the substantive claim that
23 you could bring a Brady claim. What I'm saying is the
24 language of the text of his complaint is a Brady
25 allegation, and at page 19, footnote 6 of his own brief,

1 he acknowledges that Brady claims have to be brought in
2 habeas and is left simply arguing that, one, that I can
3 describe to the Court a different theory of my
4 complaint, or that regardless of how I describe the
5 complaint, I can break out the discovery aspects of that
6 complaint and do it under 1983 and not in habeas. And
7 part of the problem with that --

8 JUSTICE SCALIA: To -- to win a Brady claim
9 in habeas, wouldn't you -- you have to show not just
10 that the -- that it was withheld, but that it was,
11 indeed, exculpatory and could have affected the outcome
12 of the trial. No?

13 MR. COLEMAN: Yes. But that claim -- that
14 showing is to be made, if at all, in habeas. And he has
15 the opportunity --

16 JUSTICE SCALIA: But he doesn't have to make
17 that showing here. I mean, that's -- that's what he
18 says distinguishes this case from habeas. In habeas,
19 you would have to show that, indeed, it would justify a
20 different outcome in the trial, whereas here he says I
21 don't have to show that; I just want the evidence.

22 MR. COLEMAN: There is some ambiguity. I'm
23 not sure I fully understand what you mean by "here." He
24 has alleged that that's what he is going to prove. What
25 he -- what he says in his brief and what he stands

1 before the Court today and says I'm going to show are --
2 are different things.

3 JUSTICE SCALIA: That's what he is going to
4 do with it. But he doesn't -- he doesn't say that I
5 need to show that in order to be entitled to -- to the
6 relief I'm asking for, whereas he would have to say that
7 in habeas.

8 MR. COLEMAN: I disagree. With respect to
9 the relief that he is ultimately seeking, the question
10 is -- if you're saying that the 1983 suit is simply a
11 retrying of the article 64 proceeding, then I -- I would
12 have to concede that article 64 does not require the
13 same showing as a habeas claim. But part of the --

14 JUSTICE ALITO: Well, aren't -- aren't
15 the -- the exculpatory nature of the evidence and its
16 materiality elements of the Brady claim itself?

17 MR. COLEMAN: Well, as -- as the Court and
18 your concurring opinion in Osborne made clear, that --
19 that "exculpatory" is really defined as demonstrating
20 that you're innocent and that it's material.

21 JUSTICE BREYER: I agree think that sounds
22 like -- I would interpret his complaint as what he wants
23 is the DNA. He thinks it's going to be exculpatory. He
24 doesn't know that till he gets it.

25 So look at Dotson. Dotson says that you go

1 into habeas if winning -- i.e., getting the DNA -- would
2 necessarily spell speedier release. End of the matter.
3 I'm reading to you from Justice Scalia's concurrence
4 where he quotes my majority with great praise.

5 (Laughter.)

6 MR. COLEMAN: Justice Scalia -- Justice
7 Scalia also makes the point at the end of his Dotson
8 concurrence that the question -- the real question is
9 whether you could make out this type of claim or this --
10 make out this type of proceeding in habeas. Ultimately,
11 Preiser and Heck --

12 JUSTICE BREYER: No, not whether you -- what
13 he's worried about -- he can speak for himself -- but as
14 I read the concurrence, he was worried that if you win
15 and take 1983 away, all kinds of things will be stuffed
16 into habeas which don't belong there. And that may be a
17 true and correct criticism, but whether it is or not, he
18 has agreed, indeed, nine members or seven members or
19 something of the Court agreed, that the test I read to
20 you is the test.

21 And now, if that's the test, getting the DNA
22 does not necessarily spell speedier release; it all
23 depends on what the -- on what that DNA shows. So why
24 isn't that end of the matter?

25 MR. COLEMAN: Because I disagree that the

1 two words "necessarily implies" are in fact sort of the
2 end of the battle and the end of the test.

3 As Justice Ginsburg noted earlier in the
4 argument, the Court has dealt with these issues in a --
5 in a variety of cases, most of them being prison
6 disciplinary or parole-type proceedings. And in those
7 cases, the Court is trying to define the outer bounds,
8 ultimately, of what we're going to say Preiser/Heck
9 required to be brought in habeas and what may be
10 brought. A couple of boundaries on those rules, but
11 first, Preiser and Heck make --

12 JUSTICE KAGAN: Mr. Coleman, if you could
13 answer Justice Breyer's question, because there are two
14 phrases, "necessarily imply the invalidity of the
15 conviction" and "necessarily spell speedier release";
16 and either you think that your case fits one of those or
17 both of those standards, or you are asking us to abandon
18 that standard.

19 MR. COLEMAN: I don't think that that's
20 true. I think that what the Court has always
21 recognized, an article 64 proceeding is a motion in the
22 criminal case. If you look at the docket number on the
23 motion, it is a motion in the criminal case.

24 What "necessarily implies" has always been
25 used for is defining the outer bounds of the rule in

1 terms of prison disciplinary proceedings, parole, other
2 things outside the criminal case itself.

3 This is an attack on the -- the criminal
4 proceeding. This is a post-conviction motion in the
5 criminal case itself. It's like a rule 60 --

6 JUSTICE KENNEDY: Filed in the -- in the
7 court of conviction?

8 MR. COLEMAN: It's not only in the court of
9 conviction; it's under the docket number of the case.

10 JUSTICE BREYER: So that's a totally
11 different area, because in Dotson when -- I think what
12 we did do was go through every of these -- every one of
13 the prior cases, and they did involve for the most part
14 the attack, as you say, on prison procedure. And those
15 cases where the attack on the proceeding would have
16 restored good-time credits, there it was shortening the
17 -- the length of confinement.

18 In those cases where there was a general
19 attack on procedures, but the procedure would simply be
20 carried on better later, like parole, there wasn't. You
21 suddenly focused me on a whole new set of areas. Where
22 in the case law is this different rule that the rule we
23 just said has nothing to do with it, if it's in the
24 case? That's basically what you are arguing. What
25 should I read to show that you were right on that?

1 MR. COLEMAN: I think Preiser and Heck both
2 stand for the fundamental proposition that Congress set
3 up habeas as a means of allowing collateral attacks.
4 Nowhere else does Congress specifically permit
5 collateral attacks on criminal proceedings. Then
6 Preiser and Heck say what we allow from that is those
7 things that may be brought in habeas should be brought
8 in habeas because the congressional intent behind the
9 habeas statute is that we expect the safeguards that
10 Congress has put in place to respect comity and
11 federalism interests as well as other interests to be --

12 JUSTICE KAGAN: But how could this be
13 brought in habeas? If Mr. Skinner wants this evidence
14 and -- and we say you file a habeas petition, what would
15 that habeas petition look like?

16 MR. COLEMAN: Well, the habeas petition --
17 we know it can be brought in habeas because, one, he has
18 already brought it. He brought a habeas petition based
19 on ineffective assistance of counsel that is, as a
20 matter of argument, indistinguishable from the no-fault
21 arguments that he is making here. The complaint's
22 against the no-fault aspect of the article 64
23 proceeding.

24 He can bring that. Many courts -- this
25 Court has never fully said that you can, but many courts

1 do allow actual innocence-type claims to go forward, and
2 so he can bring an ineffective assistance habeas, he can
3 bring an actual innocence habeas, he can do discovery as
4 part of that habeas; and when he does that -- when he
5 does that, Congress says you must respect those criminal
6 proceedings. You must show deference. You must require
7 exhaustion.

8 JUSTICE SOTOMAYOR: Mr. Coleman, the habeas
9 statute says, 2254(a), a Federal court can entertain a
10 habeas petition only on the ground that the petitioner
11 is in custody in violation of Federal law.

12 Tell me how he can write a complaint that
13 says the violation, due process violation of access to
14 DNA, means that this defendant is in custody in
15 violation of Federal law as opposed to having had a
16 statutory right improperly denied him. Tell me how does
17 he write that complaint to get into habeas?

18 MR. COLEMAN: Well he -- he's stood before
19 the Court today and explained how he would write that
20 complaint, and as I mentioned to Justice Kagan --

21 JUSTICE SOTOMAYOR: Why is he in custody
22 in -- in violation of Federal law? Because of the
23 improper --

24 MR. COLEMAN: Because he believed that he
25 received ineffective assistance of counsel and that he

1 can make --

2 JUSTICE SOTOMAYOR: But that's not his claim
3 here. His claim here is that he was denied DNA evidence
4 improperly under State law -- in violation of Federal --
5 the Federal Constitution.

6 MR. COLEMAN: That's correct. And the --
7 the last part of my answer to Justice Kagan I think is
8 the answer to your question, and that is if you make out
9 either an ineffective assistance claim or an actual
10 innocence-type claim, the congressional intent that you
11 observe and show deference and exhaustion and all those
12 things require that to be given to every step of the
13 process.

14 JUSTICE BREYER: In the particular --

15 MR. COLEMAN: But the moment you file the
16 complaint through discovery, through every substantive
17 aspect of that -- what Mr. Skinner wants to do is say:
18 I want to engage in artful pleading, and so I'm going to
19 make attacks. Today they are on DNA evidence; tomorrow
20 they may be a Brady claim; next week it may be a claim
21 against procedures used in State habeas. But as long as
22 I don't expressly ask that my custody be undone, I -- I
23 expect those claims to be allowed to go forward in 1983
24 without any of the protections of habeas, and then --
25 then if it looks after a year that they are going pretty

1 well, then I will flip it over to habeas and go forward
2 with my habeas --

3 JUSTICE BREYER: I see your point, but I
4 want to go back to try to understand this.

5 And we have the Dotson point, and you said
6 there are two other cases, Preiser and Heck. So what
7 Dotson says about Preiser is that the plaintiff there
8 wanted the shortening of his term of confinement. He
9 wanted good-time credits to be restored. And as we read
10 it then, the shortening of the term of confinement is
11 what made it proper in habeas. But we added that if it
12 hadn't been for that, if it hadn't attacked the duration
13 of the physical confinement, it wouldn't be habeas; it
14 would be 1983.

15 In Heck, the same thing. They were
16 establishing the basis for a damages claim that
17 necessarily demonstrated the invalidity of the
18 conviction. Where that was so, there would be habeas.
19 Where that was not so, even if successful, it would not
20 demonstrate the invalidity of any outstanding criminal
21 judgment, the action should be allowed to proceed in
22 1983. So as we read those two cases, they stood for the
23 exact principle I described.

24 Now, you want, perfectly fairly, to say:
25 But we didn't read them correctly, or we shouldn't have

1 read them as exclusively to say what I've just read.
2 Fine.

3 What is it, in your opinion, precisely, that
4 we should have the principle of distinguishing the one
5 1983 from habeas corpus if we were to abandon as an
6 exclusive test what we said, and I just read you in
7 those three cases: Dotson, Preiser, Heck? What's your
8 contrary approach?

9 MR. COLEMAN: I -- I think the approach is
10 if these things may be properly made the subject of a
11 habeas corpus claim, then congressional intent and the
12 habeas statute require that it be brought in habeas. I
13 think that responds --

14 JUSTICE GINSBURG: Then you are -- you are
15 asking for a modification of the Wilkinson-Dotson
16 formula, because the formula is, I think, quite clear.
17 It says: "Would necessarily demonstrate the invalidity
18 of the conviction or the sentence." Wouldn't
19 necessarily demonstrate, and the Petitioner is telling
20 us, it may not demonstrate it at all. It may
21 demonstrate that my client was, in fact, guilty. So it
22 wouldn't necessarily demonstrate the invalidity of the
23 conviction.

24 And I think to get -- to get -- to say that
25 you should prevail, you would have to say: Court, you

1 were wrong in using that formula, because here we have a
2 petitioner who says, I'm not claiming that what I'm
3 seeking would demonstrate the invalidity of the
4 conviction.

5 MR. COLEMAN: I -- I disagree with that,
6 Justice Ginsburg. I don't think that we're saying that
7 the Court is wrong. What I think I'm saying is that
8 "necessarily implies" is not a magic words test that is
9 the sort of complete and ultimate statement of the
10 Preiser-Heck rule, but rather --

11 JUSTICE GINSBURG: So you are asking for
12 something in addition. You say: Court, don't just look
13 at the words in Wilkinson v. Dotson. This is a
14 different case, as I suggested originally. This does
15 not involve parole. The ultimate destination in this
16 case is the conviction and sentence.

17 MR. COLEMAN: I think that that is correct,
18 in the sense that if you look at Dotson, which was --
19 involved a specific claim for process -- which is not
20 what they are asking for. They are asking for actual
21 relief, not process.

22 But you look at those types of cases,
23 whether it's Heck, it's a civil case that went about
24 attacking it, these cases on the periphery of what goes
25 in and out of Heck, the "necessarily implied" language,

1 I think, is a good descriptor for what is at -- was at
2 the periphery.

3 But when you attack the core of the criminal
4 proceeding itself, what his rule is simply -- is an
5 attempt to take the two words or the phrase from Dotson
6 and turn it back on itself and say -- says that, under
7 Heck, I can attack motions in the criminal proceedings
8 themselves, in the State habeas itself, as long as I
9 stop short of asking for that ultimate relief.

10 So Heck said the case is about avoiding
11 artful pleading, but now what he wants to turn it into
12 is a rule that encourages artful pleading and --

13 JUSTICE SCALIA: Maybe -- maybe we need -- I
14 mean, we've never had a case like this, and it's
15 conceivable to -- to me that we have to expand what we
16 said in Heck and Preiser. I'm not sure, however, that
17 what we ought to say is what you propose: That the test
18 is whether it could be brought in habeas. You say it
19 could be brought in habeas by claiming ineffective
20 assistance of counsel, but you would lose that -- that
21 habeas.

22 You can bring anything in habeas. I mean,
23 you can file a habeas petition. I assume you mean you
24 could possibly win in habeas. You couldn't win in
25 habeas with this claim because you couldn't show that it

1 would have affected the outcome. Isn't that so?

2 MR. COLEMAN: Well, as you noted in your
3 concurrence in Dotson, the question is not whether you
4 win, but whether you could. And the question is, if
5 it's properly the subject of habeas, then Congress has
6 demanded that all of the safeguards and protections for
7 habeas be in place. And that --

8 JUSTICE KENNEDY: Well -- well, that doesn't
9 quite give us the added formulation that some of the
10 questions suggest we need, if we're going to adhere to
11 Dotson and still rule for you. There has to be some
12 slightly different qualification. I'm not quite sure
13 what it is.

14 MR. COLEMAN: Well, I -- I'm not sure
15 exactly what you're angling for there. But at the end
16 of the day, I think that there is also a -- a
17 misunderstanding about what article 64 is.

18 Skinner treats article 64 as simply: I
19 asked for evidence, and I get evidence. And you denied
20 -- you denied me the DNA. What article 64 actually is,
21 it's a motion, as I mentioned, filed in the criminal
22 case itself, that says: Judge, I want a ruling that if
23 this additional DNA evidence were known at the time of
24 trial, then I probably would not have been convicted.

25 And the process for obtaining that ruling is

1 to make an initial threshold showing that suggests the
2 materiality of the DNA evidence. If you get over that
3 threshold, then you move on to testing, and you get a
4 hearing and an ultimate determination.

5 But there are really only two results in
6 article 64. One is a ruling that you probably would not
7 have been convicted. Or, two, I reject your request for
8 a ruling that you probably would not have been
9 convicted. And that's what he got. It is a motion that
10 goes to the core of the conviction itself.

11 JUSTICE BREYER: But if -- in Heck itself,
12 we said a 1983 action, where it is -- even if
13 successful, will not demonstrate the invalidity of any
14 outstanding criminal judgment, a 1983 action should be
15 allowed to proceed.

16 Now, I take it what you're suggesting is we
17 say that sentence is wrong or overstated, that there is
18 another circumstance.

19 MR. COLEMAN: Well --

20 JUSTICE BREYER: Even though it will not
21 demonstrate that the judgment was wrong, it still should
22 not be allowed in 1983 if it is, quote, "related to" the
23 criminal case itself. Something like that is what
24 you're proposing. Or what is it you're proposing?

25 MR. COLEMAN: What about -- where it --

1 JUSTICE BREYER: Say what it is, then. Say
2 what it is.

3 JUSTICE SCALIA: What about where its only
4 purpose is to demonstrate -- is to be able to
5 demonstrate the invalidity of a judgment?

6 MR. COLEMAN: Well, ultimately, the only
7 reason it can be brought is to demonstrate
8 the invalidity of --

9 JUSTICE BREYER: It's part of a process
10 where you hope to demonstrate. Can you bring in habeas
11 a motion, let's say, to examine police files?

12 MR. COLEMAN: You could bring a claim in
13 habeas, alleging, for instance, Brady.

14 JUSTICE BREYER: No, no. This isn't Brady.
15 What you say is I have a right under criminal law here
16 that everybody has that I can go back and take
17 depositions of the -- you have a reason for doing it.
18 You want to take their depositions because you want to
19 show that something wasn't followed. Can you do that in
20 habeas?

21 MR. COLEMAN: If you are alleging some
22 underlying constitutional invalidity of your conviction
23 and you need to --

24 JUSTICE BREYER: Is there a Federal law --
25 is there a Federal statute that -- you can't say yet

1 whether it's invalid. We don't know. What we want is
2 to get the information that will help us make that
3 decision. We think there is a law that entitles us to
4 that right. Can you bring that in habeas or not?

5 MR. COLEMAN: The discovery provisions of
6 habeas allow you to seek that as part of your habeas
7 claim, and when you do that, all the safeguards and
8 protections of habeas apply.

9 JUSTICE SOTOMAYOR: So that means FOIA
10 requests, where your only purpose is to seek out the
11 police files because you're hoping, just like you are in
12 DNA testing, that those files will show exculpatory
13 material. Then FOIA requests have to be brought in
14 habeas as well?

15 MR. COLEMAN: I think FOIA is different.
16 I -- FOIA --

17 JUSTICE SOTOMAYOR: Where --

18 MR. COLEMAN: You can ask for it. I can ask
19 for it. Chief Justice Roberts can ask for it --

20 JUSTICE KAGAN: Well, take the case,
21 Mr. Coleman -- I think there was one recently in the
22 Fifth Circuit where a prisoner asked for appellate slip
23 opinions. And the prisoner said I want these slip
24 opinions so I can write a better habeas petition.

25 Does that also have to be brought as part of

1 a habeas case, or can that be brought in 1983?

2 MR. COLEMAN: I don't know the specifics of
3 that claim, but -- but I would tend to think if -- if a
4 person generally has access to slip opinions, then --

5 JUSTICE KAGAN: No, he said he didn't have
6 enough access to slip opinions, and he needed more slip
7 opinions in order to be able to obtain a quicker release
8 from prison via habeas.

9 MR. COLEMAN: I -- I would say no. But --

10 JUSTICE KAGAN: No what? No what?

11 MR. COLEMAN: That that would not have to be
12 brought as a habeas. But, again, this is different.

13 JUSTICE KAGAN: Why is that different?

14 MR. COLEMAN: Excuse me?

15 JUSTICE KAGAN: Why -- why is that
16 different? Both the -- the prisoner is seeking a tool
17 that he hopes will lead to a quicker release, although
18 it has no certainty at all of doing so.

19 MR. COLEMAN: I think because there is no
20 right specific to him -- for instance, if I seek DNA
21 evidence, it's because I want to attack my conviction.
22 And there is no other reason to do it. If I want slip
23 opinions, it may be that I want to read them, it may be
24 for -- and the general public has access to slip
25 opinions the same way the general public --

1 JUSTICE BREYER: The library. I want to use
2 the prison library, same example.

3 MR. COLEMAN: Prison --

4 JUSTICE BREYER: I want to use the prison
5 library 9:00 to 3:00, because that's when I work on my
6 efforts to upset my conviction. Now -- I mean, it's the
7 same as Justice Kagan --

8 MR. COLEMAN: That's a condition --

9 JUSTICE BREYER: -- provided. What about
10 that?

11 MR. COLEMAN: That's a condition -- that's
12 just a prison condition. The Court has always said that
13 those types of things can be brought in 1983.

14 But -- but what we are talking about here
15 really is ultimately if you are convicted in one county
16 but you're serving time in a different part of the
17 State, you bring your habeas claim and then at the same
18 time you bring a 1983 suit, you ask for discovery and
19 say I don't want -- and this could be DNA; it could be
20 some other Brady materials; it could be an attack -- you
21 say I want to litigate the first half of my claim out
22 here without any of the protections of habeas, and then
23 if it turns out, well, I'm going to just move them over
24 and use them in my habeas, that -- without any of the
25 protections -- that is what Preiser and Heck ultimately

1 were trying to stop.

2 Heck said we -- the only time we really
3 allow these types of collateral attacks -- and -- and
4 Heck cites Rooker for this very proposition.

5 JUSTICE KENNEDY: I -- I was going to ask if
6 you have a few moments to address the Rooker argument.
7 What -- what is your response to the Petitioner's
8 counsel's explanation of why there is no Rooker here?

9 MR. COLEMAN: There -- there is a way.
10 When -- when the court said in Osborne you should use
11 these State statutes and you may -- you might have a
12 procedural due process, the court was not saying we are
13 going to create out of whole cloth an entirely new
14 category of procedural due process.

15 You do it like you do any other procedural
16 due process. If you go into the system and you -- you
17 file -- and again litigation is different from an
18 administrative procedure, which is what Dotson was
19 about. You're in litigation and you're in court. And
20 if somebody says, well, there's this prong that you
21 can't meet, and you think it violates due process, you
22 have an obligation to raise it then, and then you have
23 an opportunity, if the court rules against you, to file
24 a cert petition.

25 And if you don't do that, what we do know

1 is, from this very limited area, is that the one thing
2 that you can't do is file a Federal 1983 lawsuit saying
3 I think that what the State court did is arbitrary and
4 capricious.

5 And, so, Skinner is asking you to create a
6 1983 lawsuit that is always Rooker-Feldman barred and
7 always preclusion barred, because you're asking the
8 court to declare that the State courts violated your --
9 the constitutional rights in the way they went about it.
10 And -- and so he's asking you to create a category of
11 1983 suits that runs exactly contrary to Rooker-Feldman
12 and exactly contrary to what Heck said is this
13 overriding interest in ensuring that these types of
14 collateral attacks are brought, if at all, in habeas and
15 not through generalized 1983 lawsuits that don't provide
16 any of the protections that Congress has insisted by
17 statute be applied in these types of suits.

18 JUSTICE GINSBURG: So, then, can you give us
19 your best modified statement of Wilkinson against
20 Dotson? I think you were telling us that that formula
21 fit that type of case, would necessarily demonstrate the
22 invalidity of the conviction.

23 It's given here that this evidence would not
24 necessarily demonstrate the invalidity of the
25 conviction; nonetheless, you say it falls on the habeas

1 side of the line. That does require you to ask for a
2 modification of the Wilkinson v. Dotson formula, and I
3 ask -- if you could say what that would be, what that
4 precise modification would be?

5 MR. COLEMAN: Well, first, I don't believe
6 the Court has ever acknowledged the existence of a cause
7 of action for discovery separate and apart from the
8 merits of what you are seeking to do.

9 The merits of what he's seeking to do is to
10 attack his custody. That is something that can and
11 should be brought in habeas. And the Court should not,
12 for many reasons, create a cause of action that -- whose
13 sole purpose is to run counter to Rooker-Feldman and
14 whose sole purpose is to avoid the protections of
15 habeas.

16 Again, this is not an expansion of habeas.
17 It's simply a recognition that he has a claim that he
18 can bring in habeas, it -- it probably is a loser and we
19 think it certainly would be a loser, but the question
20 is, can he bring it, and if he can, it should be subject
21 to these types of things. And at the end, when you
22 recognize what he is trying to do, this is fundamentally
23 a question or a -- he is seeking to invalidate his
24 conviction, and that it comfortably fits within the
25 policy choices that the Court has made all the way --

1 CHIEF JUSTICE ROBERTS: So -- so the --

2 MR. COLEMAN: -- the way.

3 CHIEF JUSTICE ROBERTS: -- Justice

4 Ginsburg's question I think is an important one. Are

5 you going to argue that you fit within -- this case fits

6 within "necessarily implies," or is there another

7 formulation that you think we should have?

8 MR. COLEMAN: We think given the nature of

9 the article 64 proceeding, which is itself an attack on

10 the conviction, it is a request that the Court declare

11 that the conviction is probably invalid, that because

12 that is what he is attacking, he is saying the result

13 that is --

14 CHIEF JUSTICE ROBERTS: No, but just --

15 MR. COLEMAN: -- that -- that we do fit

16 within the "necessarily implies," because any proper

17 attack on an article 64 ruling is an attack, but that

18 within the broader context, if the Court feels a need to

19 rule on these cases in criminal proceedings, then --

20 then it should recognize it should be brought in habeas.

21 JUSTICE KENNEDY: But -- if I can have just

22 1 minute. Then if you do not file an article -- in a

23 State court at all and you just go to 1983, you're back

24 under Heck, and you haven't given us a qualification

25 that works under Heck.

1 CHIEF JUSTICE ROBERTS: Briefly.

2 MR. COLEMAN: Very, very briefly. If the --
3 if the only claim you brought -- you say, I'm -- I can
4 never meet article 64 because it says only applies to
5 convictions after January 1st, 2000. I -- I can't meet
6 that. I think it's unconstitutional. You file a 1983
7 lawsuit. You say I think that provision is
8 unconstitutional. That's really Dotson saying rule that
9 that prong is unconstitutional, but let me go back and
10 have process. That's Dotson --

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 MR. COLEMAN: -- not this case.

13 CHIEF JUSTICE ROBERTS: Mr. Owen, take 5
14 minutes -- or you have 5 minutes.

15 REBUTTAL ARGUMENT BY ROBERT C. OWEN

16 ON BEHALF OF THE PETITIONER

17 MR. OWEN: Mr. Chief Justice --

18 JUSTICE SOTOMAYOR: Mr. Owen, I know I'm
19 pushing you, but I really would like a clear statement
20 of what the procedural due process violation that you
21 are claiming occurred here is.

22 MR. OWEN: Your Honor, our -- our claim is
23 that in its construction of the statute, the Texas Court
24 of Criminal Appeals construed the statute to completely
25 foreclose any prisoner who could have sought DNA testing

1 prior to trial, but did not, from seeking testing under
2 the postconviction statute, that is --

3 JUSTICE SOTOMAYOR: You're not -- you --

4 MR. OWEN: -- that speaks too broadly.

5 So --

6 JUSTICE SOTOMAYOR: Then let me follow this
7 through. You're not attacking the constitutionality of
8 article 64 on its face, right? Or are you?

9 MR. OWEN: Your Honor, this -- this came up
10 as we were preparing for our presentation, and I think
11 there's -- there's -- here's what I would like to say:
12 We are not suggesting that article 64 -- that there's no
13 way to interpret article 64 that the court could have
14 chosen to -- to construe the statute that would always
15 be unconstitutional in every case. That's what --

16 JUSTICE SOTOMAYOR: So, what --

17 JUSTICE SCALIA: It chose to construe it the
18 way it construed it. You -- you can't attack the way --
19 the way the State Supreme Court construed its statute.

20 MR. OWEN: That's right, Your Honor.

21 JUSTICE SCALIA: You're attacking the
22 statute.

23 JUSTICE SOTOMAYOR: Are you saying -- and
24 that's -- this is where I have difficulty -- that by
25 failing to acknowledge Petitioner's ineffective

1 assistance of counsel claim, that that was the court's
2 error?

3 MR. OWEN: No, Your Honor. Our claim --

4 JUSTICE SOTOMAYOR: And that was a good
5 enough excuse to excuse the fact that he didn't do
6 DNA -- DNA testing at the time of trial? Because that's
7 what the statute says. You can't get it if it was
8 present at the time and -- meaning if that actual test
9 that you're seeking was available at the time of trial,
10 or you don't prove that you couldn't have done it for a
11 good reason. So what is it exactly that the court did
12 in applying this that was unconstitutional?

13 MR. OWEN: Your Honor, I think it's not the
14 specific question to whether in our case they didn't
15 consider our ineffective assistance of counsel
16 arguments. It's that it made no provision for any
17 exception to its rule. In other words, that it
18 interpreted this as a blanket proscription on seeking
19 testing for anybody who didn't seek it prior to trial.

20 JUSTICE SOTOMAYOR: But, wait a minute.
21 That's what the statute says. The statute gives the
22 conditions under which a petitioner can seek DNA
23 evidence, and it said you didn't meet those conditions.
24 I'm still trying to figure out what you're arguing --

25 MR. OWEN: I think --

1 JUSTICE SOTOMAYOR: -- was the procedural
2 due process violation in their application of those
3 items. So are you challenging it facially, or are you
4 challenging it as applied, but as applied how?

5 MR. OWEN: Once -- once the Court of
6 Criminal Appeals construes the statute, that's what the
7 statute means, and we are challenging that. If that's
8 what the Court's --

9 JUSTICE SOTOMAYOR: And so what do you
10 think --

11 MR. OWEN: If that's what Your Honor
12 described as facial.

13 JUSTICE SOTOMAYOR: What is it about what
14 they said it means that's unconstitutional?

15 MR. OWEN: That it -- that it is not -- that
16 it does not admit of any exceptions and that it doesn't
17 have any reference to the purposes of the statute, the
18 reasoning the testing might not have been sought in a
19 particular case, or the fact, particularly that, in our
20 case, Mr. Skinner at the time of his trial, this -- the
21 postconviction DNA testing statute was still 6 years in
22 the future. So that -- so that to the extent the Court
23 of Criminal Appeals portrayed Mr. Skinner as making a
24 choice, that's -- that's not accurate, because he didn't
25 make a choice.

1 JUSTICE SOTOMAYOR: I don't even -- I'm not
2 even sure what that argument ties to, because I thought
3 what the court said was: This DNA testing was available
4 then. You could have gotten it. Strategically your
5 trial attorney chose not to, and so that disqualifies
6 you from seeking it now.

7 I'm not quite sure what the date of the
8 statute's passage, whether it makes any difference,
9 because -- because why?

10 MR. OWEN: Well, let me then -- I -- I've
11 always felt that it was intuitively, especially unfair
12 to accuse him of laying behind the log when there was no
13 log to lie behind. But that's -- that's not our point
14 in responding to your question, Your Honor. Our point
15 is simply that we think that the exception that they
16 crafted in construing the statute or the statute as
17 construed sweeps too broadly. The exception sweeps too
18 broadly.

19 Now, the Court may not necessarily -- we may
20 not prevail on that eventually. We're going to litigate
21 that, and I think that we will fight that out in the
22 district court. But the question for this Court is
23 we --

24 JUSTICE KAGAN: So, Mr. Owen, if I
25 understand you correctly in how this understanding of

1 the claim relates to the Rooker-Feldman doctrine, what
2 you are saying is that the statute as construed was
3 unconstitutional?

4 MR. OWEN: Yes.

5 JUSTICE KAGAN: And that that falls outside
6 the bounds of the Rooker-Feldman doctrine?

7 MR. OWEN: Yes, Your Honor.

8 JUSTICE KAGAN: Whereas, if you were saying
9 that the statute -- that the application of the statute
10 in this particular case was wrongful, that would not
11 fall outside of the Rooker-Feldman doctrine; is that
12 right?

13 MR. OWEN: That's right, Your Honor, and the
14 comment that was made during Respondent's argument
15 about -- he said we are challenging, in his words, the
16 way the State court went about applying the law to Mr.
17 Skinner. That's not what we're challenging. We're
18 challenging the statute as construed.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 MR. OWEN: Mr. Chief Justice.

21 CHIEF JUSTICE ROBERTS: The case is
22 submitted.

23 (Whereupon at 11:04 a.m., the case in the
24 above-entitled matter was submitted.)

25

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